

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LEONARD CANADAY, JR.

v.

WELLS FARGO BANK, N.A.

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Civil Action No. 4:17-CV-552

(Judge Mazzant/Judge Nowak)

MEMORANDUM ADOPTING IN PART THE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge Christine Nowak in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On October 12, 2017, the report of the Magistrate Judge (Dkt. #19) was entered containing proposed findings of fact and recommendations that Defendant's Motion to Dismiss (Dkt. #13) be **GRANTED** and that each of Plaintiff's claims against Defendant be **DISMISSED**.

In this case, the Magistrate Judge recommended that Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) be granted, which would be a decision on the merits of the case. In the same report and recommendation, the Magistrate Judge also recommended dismissal of the case pursuant to Rule 41(b), which is not a decision on the merits and would be a dismissal without prejudice. In her analysis on the Rule 12(b)(6) motion, the Magistrate Judge indicates that Plaintiff offered no evidence in opposition to the motion to dismiss. The Court rejects this finding as the Magistrate Judge applied the wrong legal standard. In deciding a Rule 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and Plaintiff has no obligation to produce evidence to defeat a motion to dismiss. The Court also finds it inconsistent that the Magistrate Judge made a decision on the merits as well as finding that Plaintiff failed to prosecute this action. It is clear that Plaintiff is not prosecuting this case, and the proper course is to dismiss

this case pursuant to Rule 41(b). Therefore, the Court **REJECTS** the portion of the Magistrate Judge's report and recommendation that grants Defendant's motion to dismiss.

Having received the report of the Magistrate Judge, and no objections thereto having been timely filed, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct as to the Rule 41 dismissal and adopts in part the Magistrate Judge's report as the findings and conclusions of the Court.

It is therefore **ORDERED** that Plaintiff's case is hereby **DISMISSED** for failure to prosecute pursuant to Fed. R. Civ. P. 41(b).

All relief not previously granted is **DENIED**.

The Clerk is directed to close this civil action.

IT IS SO ORDERED.

SIGNED this 14th day of November, 2017.


AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE